

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-1070

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1070

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR CUMBERBATCH,

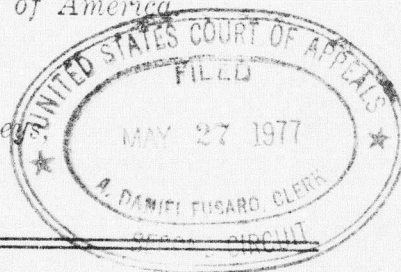
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1070

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR CUMBERBATCH,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Victor Cumberbatch appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on February 10, 1977, after a four day trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury.

Indictment 76 Cr. 1076, filed November 23, 1976, charged Victor Cumberbatch in Count One with conspiracy to commit bank robbery and in Count Two with possession of a firearm during the commission of a felony in violation of Title 18, United States Code, Sections 371 and 924(c)(2), respectively. Cumberbatch had previously been named in Indictment 73 Cr. 319, filed April 12, 1973. That indictment charged Cumberbatch, Oscar Lee Washington, Pedro Mario Monges, and Raul Estremera in Count One with bank robbery, in Count Two with bank

larceny, and in Count Three with armed bank robbery in violation of Title 18, United States Code, Sections 2113 (a), (b), and (d), respectively. Cumberbatch moved to dismiss Indictment 73 Cr. 319 on the grounds that he had been transported from federal to state custody in violation of the Interstate Agreement on Detainers, 18 United States Code App. That motion was granted by Judge Palmieri on December 13, 1976.*

Trial on Indictment 76 Cr. 1076 commenced against Cumberbatch on December 13, 1976, and concluded on December 16, when he was found guilty on both counts. On February 10, 1977, Judge Palmieri imposed consecutive sentences of five years' imprisonment on Count One and ten years' imprisonment on Count Two. Judge Palmieri also directed that the sentences were to run consecutive to sentences imposed on Cumberbatch in the Supreme Court, Bronx County. Cumberbatch is now serving his state sentence.

Statement of Facts

The Government's Case **

On February 9, 1973, at approximately 10:00 A.M., four men, Victor Cumberbatch, Raul Estremera, Oscar Lee Washington, and Pedro Mario Monges, entered the

* By the time Judge Palmieri dismissed Indictment 73 Cr. 319 against Cumberbatch, the remaining defendants named therein had all been convicted. Oscar Lee Washington and Pedro Mario Monges entered pleas of guilty to Count One and were each sentenced to eighteen years' imprisonment by Judge Kevin T. Duffy. Raul Estremera was convicted on all three counts after a jury trial before Judge Duffy and was sentenced to seventeen years' imprisonment. His conviction was affirmed by this Court. *United States v. Estremera*, 531 F.2d 1103 (2d Cir.), cert. denied, 425 U.S. 979 (1976).

** The principal facts in this case are summarized in this Court's opinion in *United States v. Estremera*, supra, 531 F.2d at 1105.

branch of the First National City Bank located at 505 Southern Boulevard, Bronx, New York. Monges first approached Rodolfo Romero, the bank guard, pointed a pistol wrapped in a newspaper at him, and announced that a holdup was underway. (Tr. 249-50).*

Washington, who was carrying a number of newspapers under his arm, then approached Albert Randall, the assistant bank manager, and struck him on the head with a pistol. He then aimed the pistol at Randall's head and asked if he was the bank manager. When Randall said that he was not, Washington grabbed Randall's tie and dragged him along the bank floor until he was lying prostrate in the center of the main banking floor. (Tr. 234-36).

While Washington was thus engaged, Cumberbatch removed a long barreled gun from underneath his cape and ordered all those in the bank to lie on the floor. James Bolla, the bank manager, observed Washington hitting Randall and informed him that he, and not Randall, was the manager of the bank. Washington then directed Bolla to go behind the teller's counter. Bolla led Monges and Washington to the cash drawers, two of which they proceeded to loot of \$25,321.75. (Tr. 172-74, 250).**

During the looting of cash drawers Cumberbatch and Estremera remained on the main banking floor, robbing the customers of valuables. Cumberbatch approached

* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief.

** While Monges and Washington were emptying the cash drawers, two surveillance cameras located above the bank's main entrance were activated. (Tr. 178-79). The cameras photographed the remainder of the robbery, and certain of these photographs were introduced in evidence as Government's Exhibits 1-67.

Randall, knelt beside him and removed his wallet. In doing so he ripped Randall's trousers from hip to knee. After removing the wallet Cumberbatch began to beat Randall on the head with the barrel of his weapon. (Tr. 174, 236-37; GX 9-24). One blow struck Randall's head with such force that it sent his glasses flying across the floor. (GX 18-19).

After leaving the bank, the robbers, using a Ford and an Oldsmobile, drove six blocks to Crimmins Avenue. Leroy Irvin, a resident of the street, saw them leave these two cars and enter a red Ford van and another vehicle. (Tr. 284-87).

Later that morning, the bank and the surrounding area were searched for evidence by agents of the Federal Bureau of Investigation. One agent, John Janson, found a copy of the newspaper "Mohammed Speaks" bearing the date February 9, 1973 (GX 72) in a trash can behind the tellers' counters. Other copies of this newspaper were found elsewhere in the bank. (Tr. 295-98). Another agent, James Murphy, located the Ford and the Oldsmobile abandoned by the robbers on Crimmins Avenue. (Tr. 281-83). Both automobiles were towed to a garage maintained by the F.B.I. in Manhattan. Agent Robert McCartin, who had followed the Oldsmobile during the towing from the Bronx to Manhattan, searched the car in the F.B.I. garage. He found, *inter alia*, a copy of the *New York Daily News* dated February 8, 1973. (GX 73).

Both of these newspapers were submitted to the F.B.I. laboratory in Washington for examination. James Jenkins, the F.B.I. fingerprint expert assigned to the case, concluded that the front page of the "Mohammed Speaks" found in the trash can bore four latent fingerprints belonging to Cumberbatch. He also concluded that pages 1, 9, and 91 of the *Daily News* found in the Oldsmobile

bore latent fingerprints of Cumberbatch. (Tr. 336-I-356; GX 76, 77).*

On March 5, 1973, Bolla was shown a spread of photographs by two members of the New York City Police Department. (GX 68). He selected a photograph of Cumberbatch taken October 15, 1972 (GX 68E) as the man wearing a cape and carrying a long barreled gun during the bank robbery. (Tr. 185-86).

The weapon carried by Cumberbatch during the robbery was identified by Robert Scroggie, a firearms enforcement inspector employed by the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department, as a Commando Mark III .45 caliber semi-automatic carbine. (Tr. 267).

The Defense Case

Gladys Atkins, Cumberbatch's mother, testified that he was born February 20, 1953, that he never wore prescription glasses, and that, to her knowledge, he had never learned to speak Spanish. (Tr. 384-85).

A R G U M E N T

POINT I

The Interstate Agreement on Detainers Did Not Require Dismissal of Indictment 76 Cr. 1076.

On December 13, 1976, Judge Palmieri granted a defense motion to dismiss Indictment 73 Cr. 319 because the Government had transferred Cumberbatch from

* The owner of the Oldsmobile, Louis Robinson, testified that his automobile had been stolen on February 7, 1973. He also testified that he did not know Cumberbatch and had never given him a ride in his car. (Tr. 290-92).

federal to state custody prior to trial in violation of Article IV (e) of the Interstate Agreement on Detainers, 18 U.S.C. App. (hereafter "the Agreement"). Cumberbatch was then tried on Indictment 76 Cr. 1076. Cumberbatch argues here that both the "letter and the spirit" of the Agreement, as well as the Double Jeopardy clause of the Constitution, required dismissal of the second indictment as well.

The Government's response to this contention is twofold. First, since the transfers of which Cumberbatch now complains occurred prior to this Court's decision in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed* (May 9, 1977), that decision should not be retroactively applied. Second, even if *Mauro* were so retroactively applied, it should not be extended to cover the facts of this case.

A. Prior Proceedings Against Cumberbatch

Cumberbatch was first indicted on April 12, 1973 (73 Cr. 319). He failed to appear for arraignment on that indictment and a bench warrant was issued for his arrest on April 23, 1973.* On June 5, 1973, Cumberbatch was arrested by the New York City Police Department and charged with the murder of New York City Transit Policeman Sidney Thompson. After his arrest he was unable to make bail on the state charges and was remanded to state custody.

* This account of the prior proceedings is based largely on the district court docket sheet for Indictment 73 Cr. 319; on the affidavit of Assistant United States Attorney Jeremy G. Epstein, filed September 13, 1976 in opposition to Cumberbatch's motion to dismiss; and on the factual findings in Judge Palmieri's opinion, filed December 16, 1976.

Cumberbatch first appeared in the Southern District of New York on October 26, 1973, when he was produced pursuant to a writ of *habeas corpus ad prosequendum* issued to the New York City Correctional Institution on Rikers Island. He pleaded not guilty before Judge Kevin T. Duffy, to whom the indictment had been assigned. The Legal Aid Society was appointed to represent him and was given twenty days within which to make motions. Cumberbatch was then returned to state custody.* The Government filed its notice of readiness as to Cumberbatch on December 18, 1973. (Docket sheet, pp. 1-3).

Cumberbatch's co-defendant, Raul Estremera, was tried before Judge Duffy from May 19, 1975 to May 23.** Because Cumberbatch's murder trial was simultaneously underway in the Supreme Court, Bronx County, it was not possible to try him together with Estremera. Cumberbatch's Bronx trial ended on or about June 28, 1975, and on June 30 the Assistant United States Attorney in charge of the case advised Judge Duffy's chambers that the Government was ready for trial. On July 7, 1975, the Assistant United States Attorney wrote Judge Duffy a letter again announcing the Government's readiness for trial and pointing out a problem regarding

* No federal detainer was ever lodged against Cumberbatch during the pendency of this prosecution. Compare *United States v. Ford*, 550 F.2d 732, 736 (2d Cir. 1977).

This first transfer of Cumberbatch was without significance under the Agreement, since he was at that time awaiting trial in the state court. *United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977).

** Estremera, who had also been a fugitive, was arrested in Canada in January, 1974 and extradited to the United States in January, 1975. See *United States v. Estremera*, *supra*, 531 F.2d at 1106.

Cumberbatch's representation.* (Epstein affidavit, ¶¶ 3, 4).

Judge Duffy held a conference on September 9, 1975, for which Cumberbatch was produced by a writ of *habeas corpus ad prosequendum*. At that conference, Robert Bloom, Esq., who had represented Cumberbatch at his state trial, was appointed to represent him in place of the Legal Aid Society. Bloom advised Judge Duffy

* The letter, appended as Exhibit 3 to the Epstein affidavit of September 13, 1976, reads in full as follows:

July 7, 1975

Honorable Kevin T. Duffy
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Victor Cumberbatch*
73 Cr. 319

Dear Judge Duffy:

As you may know, Mr. Cumberbatch's trial in the Supreme Court, Bronx County ended on or about June 28, 1975. On June 30, 1975 I informed your chambers that we would be ready for trial at Your Honor's convenience.

On July 3 I spoke to Robert Bloom, Esq., who represented Mr. Cumberbatch during his trial in the Supreme Court. I specifically inquired whether Mr. Bloom intended to represent Mr. Cumberbatch at the trial of the instant indictment. On October 26, 1973, when Mr. Cumberbatch was arraigned, the Legal Aid Society was appointed to represent him and theirs is the only appearance noted on the docket sheet. Mr. Bloom, as I understood him, replied that he had not yet decided whether or not he would represent Mr. Cumberbatch.

In light of this apparent uncertainty, I would respectfully suggest a conference to clarify the question of Mr. Cumberbatch's representation.

Respectfully yours,
PAUL J. CURRAN
United States Attorney

By:
JEREMY G. EPSTEIN
Assistant United States Attorney

that because he was committed to try two cases in the next two months he would be unavailable for trial until early November 1975. (Tr. of September 9, 1975, pp. 6-8). Judge Duffy then instructed Bloom to advise the Assistant handling the case as soon as his second trial was concluded (*Id.*, p. 9). Bloom agreed to do this. (*Id.*, p. 11).*

After his appointment, Bloom filed no motions and made no written demands for pretrial discovery.**

* During the conference the following colloquy took place between Judge Duffy and Cumberbatch:

The Court: Mr. Cumberbatch, where are you presently lodged?

The Defendant: I am lodged across the street, in the new facility.

The Court: How about with the state? Where are you supposed to be with them?

The Defendant: Clinton.

The Court: All right. I gather you know Mr. Bloom, is that correct?

The Defendant: Yes.

The Court: Would you be willing to have him appointed your attorney?

The Defendant: Yes, sir.

The Court: Do you understand what his schedule is presently and I could not try this case until the middle of November. Do you understand that?

The Defendant: Right.

The Court: During that period of time you will be in state custody, do you understand that too?

The Defendant: Right. (*Id.*, p. 8).

At the conclusion of the hearing Cumberbatch was returned to state custody. This was accomplished on the record, with no objection by Cumberbatch or his attorney.

** In response to an informal discovery demand Bloom made at the September 9 conference, the Government advised Bloom by letter dated September 26, 1975 that a spread of photographs containing Cumberbatch's picture was shown by the New York City Police Department to the three eyewitnesses. (That letter was marked Court's Exhibit 1 at trial). As Bloom acknowledged at trial (Tr. 44), he never asked to see these photographs and did not see them until the day that the trial was due to commence, December 13, 1976.

On or about April 13, 1976, Judge Duffy fixed June 7, 1976 as the trial date. Bloom was notified by letter from the Government dated April 13, 1976. (Epstein affidavit, Ex. 4). By letter dated April 26, 1976, Bloom objected to the trial date fixed; Judge Duffy, however, did not alter the date in response to the letter. (Palmieri opinion, p. 3; Epstein affidavit, ¶ 7).

On June 7, 1976, Cumberbatch was again produced pursuant to a writ of *habeas corpus ad prosequendum*. Bloom appeared on that day and announced that he was engaged in a trial in the Supreme Court, New York County. Judge Duffy thereupon adjourned the trial to July 13, 1976. The writ was satisfied and Cumberbatch was returned to state custody.* Because Bloom's trial did not end by July 13, 1976, the trial was adjourned *sine die*. (Palmieri opinion, p. 3).

On August 12, 1976, Cumberbatch moved to dismiss the indictment on the grounds that the Government's failure to try him before returning him to state custody violated Article IV(e) of the Agreement. Judge Duffy denied the motion on September 18, 1976. The case was transferred to Judge Palmieri on October 29, 1976, three days after this Court decided *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed* (May 9, 1977). Indictment 76 Cr. 1076 was filed on November 23, 1976, and the trial of both indictments was set for December 13, 1976. On that day, Judge

* Bloom had requested (Tr. of June 7, 1976, p. 2) that Cumberbatch be kept in federal custody until July 13, 1976. The Government, however, chose to return Cumberbatch to state custody because of overcrowding at the Metropolitan Correctional Center and because Cumberbatch was deemed a serious escape risk. (Palmieri opinion, p. 3; Epstein affidavit, ¶ 10). Cumberbatch had been arrested on April 16, 1975, along with seven others after trying to escape from the Rikers Island Correctional Facility.

Palmieri dismissed Indictment 73 Cr. 319 on the authority of *Mauro* (Palmieri opinion, pp. 3-4; Tr. 8). Judge Palmieri initially reserved decision on Cumberbatch's motion to dismiss Indictment 76 Cr. 1076, and on December 16, 1976 filed an opinion denying the motion.

B. This Court's Decision in *United States v. Mauro* Should Not be Applied Retroactively

This Court's decision in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), ruled for the first time in any court of appeal that the Agreement limited the Government's ability to procure state prisoners under a writ of *habeas corpus ad prosequendum*. Subsequently, in two decisions in which the Government's briefs were filed before the filing of the *Mauro* decision, the Court has reaffirmed its holding in *Mauro*. *United States v. Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977); *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977). This Court has not, however, addressed the fundamental issue of whether the Court's novel interpretation of the Agreement should be applied to transfers that antedated it and that occurred at a time when literally no one ever considered that writs of *habeas corpus ad prosequendum* were somehow limited.

In numerous decisions concerning the possible retroactivity of its prior decisions, the Supreme Court has routinely granted full retroactive effect only in two situations: where the new decision relates to an "aspect of the criminal trial that substantially impairs its truth-finding function," *United States v. Peltier*, 422 U.S. 531, 535 (1975),* and where the conduct that is the subject

* See, e.g., *Ivan V. v. New York*, 407 U.S. 203, 204 (1972); *McConnell v. Rhay*, 393 U.S. 2 (1968); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963).

of the indictment was found under the prior decision to be "constitutionally immune from punishment."** In other situations, the Supreme Court has adopted a three-prong test based upon 1) the purpose to be served by the new decision, 2) the extent of reliance upon the previous law by the Government, and 3) "the effect on the administration of justice of a retroactive application of the new decision." *Halliday v. United States*, 394 U.S. 831, 832 (1969); *Desist v. United States*, 394 U.S. 244, 249 (1969); *Stovall v. Denno*, 388 U.S. 293, 297 (1967).** Each of these factors clearly demonstrates that *Mauro* should not be applied retroactively.

Turning first to the purpose to be served by the prior decision, the purposes of the Agreement are set forth in Article I: "to encourage the expeditious and orderly disposition" of charges outstanding against a prisoner, and to eliminate "uncertainties which obstruct programs of prisoner treatment and rehabilitation." Neither of these objectives bears any relation to the truth-determining function of a trial, nor does it designate a sphere of activity constitutionally immune from punishment. Hence, the only justifications recognized by the Supreme Court for applying its decisions retroactively are absent. Moreover, neither of the stated purposes of the Agreement could be significantly

* See, e.g., *Robinson v. Neil*, 409 U.S. 505, 509 (1973); *United States v. U.S. Coin & Currency*, 401 U.S. 715, 723-24 (1971).

** This Court has also retroactively applied decisions that merely "clarify or extend" prior law. *Gates v. Henderson*, Dkt. No. 76-2065, slip op. 1345, 1350 n. 2 (2d Cir., January 12, 1977), suggestion for rehearing *en banc* granted; *Welcome v. Vincent*, 549 F.2d 853, 858 n. 3 (2d Cir. 1977); see also *Ferguson v. United States*, 513 F.2d 1011, 1012 (2d Cir. 1975) (Kaufman, C.J.). As the *Mauro* panel acknowledged, 544 F.2d at 589 its decision was wholly unprecedented, and thus these decisions are inapplicable. Indeed in *Ferguson* the Court noted that prospective application was appropriate for new decisions "which conflicted with well-established prior practice." *Id.*

furthered by its retroactive application here. There is nothing in the record to suggest that Cumberbatch's program of rehabilitation has been impaired by his trips to the Southern District of New York. Further, Cumberbatch, as Judge Palmieri found, has never displayed the slightest interest in having his case resolved expeditiously. Even putting aside the specifics of Cumberbatch's situation, we submit that it is inconceivable that "the expeditious and orderly disposition" of criminal cases would be furthered by retroactive application of *Mauro*. Prior to *Mauro*, a defendant's interest in prompt adjudication was more than adequately protected by the strictures of the Sixth Amendment, the various local speedy trial plans, and, more recently, by the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.* In this regard, the Supreme Court has noted that in determining retroactive application of its decisions, it will consider whether "other safeguards are available" to protect the right asserted. *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966). Other safeguards are plainly available here.

The most important factor militating against retroactive application of *Mauro* is the reliance of law enforcement authorities on prior law. The Government argued to this Court in *Mauro* that a writ of *habeas corpus ad prosequendum*, issued pursuant to 28 U.S.C. § 2241 (c) (5), was not a "detainer" within the meaning of the Agreement, and that when a prisoner's presence was obtained through a writ rather than through the elaborate mechanisms of the Agreement, the Government was bound by none of the Agreement's restrictions. This was not merely a position that the Government advanced as an advocate: the argument accurately reflected the prior practice not only of the Government, but of all the state jurisdictions with which it had to deal in obtaining prisoners from state custody. Although the Court rejected the Government's arguments, with Judge Mansfield dissenting, it acknowledged that the decision was "one of first impression in this Court." 544 F.2d at 589. Indeed,

the Fifth Circuit has recently declined to follow *Mauro* and has held that a writ of *habeas corpus ad prosequendum* is not a detainer within the meaning of the Agreement, *United States v. Scallion*, 548 F.2d 1168 (5th Cir. 1977).^{*} This difference of opinion indicates that the *Mauro* decision was not intuitively obvious, and strongly suggests that prior reliance on the assumption that a writ was not a detainer was by no means irrational.^{**} Furthermore, if the Government had entertained even the slightest suspicion that the use of a *prosequendum* writ triggered the mechanisms of the Agreement, it would obviously not have returned Cumberbatch to state custody untried. Indeed, it is significant that the defendant no less than the Government and the State of New York appeared to assume that the Agreement was inapplicable to these proceedings. Cumberbatch was brought to the Southern District of New York three times, in October, 1973, September, 1975, and June, 1976, and yet he did not move to dismiss this indictment until August, 1976. Furthermore, neither he nor his counsel ever raised any objection to his return to state custody based on the Agreement. No clearer case for a reliance on prior law could be made.

Third, the effect of a retroactive application of *Mauro* on the administration of justice is equally clear

^{*} Several judges in the Southern District of New York had also rejected the reasoning of the district court opinion in *Mauro* prior to this Court's decision. See *United States v. Brown* — F. Supp. —, 76 Cr. 244 (S.D.N.Y., July 15, 1976) (Metzner, J.); *United States v. Lee*, — F. Supp. —, 76 Cr. 552 (S.D.N.Y., August 16, 1976) (Goettel, J.). No judge in the Southern District had agreed with Judge Bartels' decision prior to its affirmance. In the Third Circuit, the issue has been referred to the entire Court *en banc*. *United States v. Sorrell*, Dkt. No. 76-1647 (argued May 2, 1977).

^{**} The Supreme Court has noted that retroactive application is inappropriate "if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law. . . ." *United States v. Peltier*, *supra*, 422 U.S. at 538.

and equally devastating. Prior to the *Mauro* decision, prisoners were transferred on a regular basis from state to federal custody and back without regard for the provisions of the Agreement. It is highly likely, therefore, that there are significant numbers of convicted federal prisoners whose transfers from state to federal custody violated the Agreement. As word of the *Mauro* decision spreads, many, like Cumberbatch, will raise a claim under the Agreement concerning transfers that occurred months or years before *anyone* had any inkling that the literally centuries-old, see *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.); *Carbo v. United States*, 364 U.S. 611 (1961), power of the Federal Government to procure prisoners on a writ was somehow limited in the way announced in *Mauro*.* The adjudication of these claims, brought by individuals whose guilt of the crimes charged is no longer subject to question is definitely contrary to any view of the interests of justice.

Finally, Cumberbatch cannot argue that the Supreme Court's retroactivity analysis does not apply because the *Mauro* decision merely interpreted a statute. First, this Court's decision in *Mauro* did not merely interpret the Agreement, but created a prophylactic rule to implement it. If the Agreement had stated, explicitly or with any reasonable clarity, that writs of *habeas corpus ad prosequendum* were henceforth governed by the intricate provisions of the Agreement, neither the Government nor any other party would have to wait for

* One judge in the Southern District of New York has already ruled that a convicted defendant may raise a claim under the Agreement for the first time in a motion filed pursuant to 28 U.S.C. § 2255 and has thus vacated a conviction on this ground. *United States v. Heimerle*, — F. Supp. —, 76 Civ. 5563 (S.D.N.Y., December 15, 1976) (Brieant, J.). This issue is now pending in an unrelated case before the Court. *United States v. Chico and Colello*, Dkt. No. 77-1016 (argued March 31, 1977).

a court to interpret the Agreement before following it, since the law would be "circulated throughout the legal community and judges and attorneys [would] become aware that from a certain date in the future they will have to modify their practices." *Korenfeld v. United States*, 451 F.2d 770, 774 (2d Cir. 1971), *cert. denied*, 406 U.S. 975 (1972) (applying *Bye v. United States*, 435 F.2d 177 (2d Cir. 1970) prospectively only). One can search in vain, however, for any such statement in the Agreement, or even a concrete representation of legislative intent; the Court's observation that the Government is a "party" to the Agreement simply does not resolve the issue of the Agreement's effect on the Government's independent power—not available to the states—of using writs. Rather, this Court's conclusion that writs were now limited by the Agreement was based solely upon its reasoning that "[a]ny other construction would permit the United States to evade and circumvent the Agreement," 544 F.2d at 592. This determination is a prophylactic one of precisely the sort to which the retroactivity analysis most directly applies, *Michigan v. Payne*, 412 U.S. 47, 53 (1973).*

Second, the courts that have considered the issue have concluded that the Supreme Court's retroactivity analysis applies to an unforeseen interpretation of a statute, and indeed the Supreme Court has so ruled. This was made explicit by this Court's unanimous, *en banc* decision

* Furthermore, the Court's purpose of enforcing compliance with the Agreement's purposes would be more than adequately served by prospective application; indeed, we represent to the Court that since the new interpretation of the Agreement became known, all transfers of prisoners have been conducted in accordance with the Agreement. In addition, it should be noted that the Government never attempted to "evade and circumvent" the Agreement in any intentional sense. It was simply our understanding between 1970 and 1976 that the Agreement did not apply to federal writs—an understanding in which we have been joined by Judge Mansfield, the Fifth Circuit, and numerous District judges.

in *United States v. Kaylor*, 491 F.2d 1133, 1138-39 (2d Cir.) (*en banc*), *vacated and remanded on other grounds*, 418 U.S. 909 (1974), applying its interpretation of the Youth Corrections Act prospectively only, and specifically employing the *Desist* and *Stovall* tests. Similarly, in *Bailey v. Holley*, 530 F.2d 169, 172-74 (7th Cir. 1976), the Court specifically rejected "petitioner's contention that *Stovall* criteria for deciding questions of retroactivity are not applicable to decisions based on statutory construction." *Id.* at 173. See also *Mower v. Britton*, 504 F.2d 396, 399 (10th Cir. 1974). Other circuits have ruled similarly. See, e.g., *Owens v. United States*, 383 F. Supp. 780, 785-87 (M.D. Pa. 1974), *aff'd*, 515 F.2d 507 (3d Cir.), *cert. denied*, 423 U.S. 996 (1975); *Jackson v. United States*, 510 F.2d 1335 (10th Cir. 1975); *Krilick v. United States*, 502 F.2d 680, 683 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). Indeed, the Supreme Court itself has afforded prospective applicability to its prior interpretation of written law. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Court held that in the absence of strict compliance with Rule 11 of the Federal Rules of Criminal Procedure a guilty plea must be vacated. Although, as a concurring justice noted, the decision "merely interpreted Rule 11 . . . and held that the rule must be strictly applied according to its terms," *Halliday v. United States*, 394 U.S. 831, 834 (1969) (Harlan, J., concurring), the Court held that it would be applied prospectively only, *Halliday v. United States*, *supra*, 394 U.S. at 832-33, explicitly following the three-pronged test of *Desist* and *Stovall*.

In sum, the prophylactic purposes of this Court's ruling in *Mauro* are amply served by the present strict adherence to the provisions of the Agreement now practiced by the United States Attorneys in this Circuit. While the costs of prospective application are minimal—particularly since, as noted, the purposes of the Agreement are already served by other laws—the costs of retrospec-

tive application are immense: unquestionably guilty men will be freed only because of the Government's reliance on practices that no one (including, apparently, defendants) thought irregular.*

C. Prosecution of Cumberbatch Under Indictment 76 Cr. 1076 Did Not Violate the Interstate Agreement on Detainers

Even if *Mauro* is applied to transfers antedating it, it nonetheless did not require Judge Palmieri to dismiss the indictment upon which Cumberbatch was tried. Cumberbatch was brought from state custody only once on Indictment 76 Cr. 1076, and on that occasion he was tried. No violations of Article IV(e) of the Agreement were committed during the pendency of the second indictment, and the Agreement furnishes no basis for its dismissal.

Cumberbatch's argument for dismissal, simply put, is that once an indictment is dismissed on the authority of the Agreement, no subsequent indictment may be brought containing charges that arise from the criminal transaction described in the dismissed indictment. In advancing this argument, he ascribes to the Agreement

* If we are correct that *Mauro* applies only to transfers occurring after the filing of that decision, it inevitably follows that Cumberbatch's claim on appeal is meritless, without recourse to our further argument in Point I(C). If *Mauro* was inapplicable to the transfers of Cumberbatch, then Judge Palmieri incorrectly dismissed the first indictment, and his denial of Cumberbatch's motion to dismiss the present indictment was correct, although for different reasons than those he stated. As the Supreme Court has noted, an appellee may "urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or on insistence upon matter overlooked or ignored by it." *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Morley Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937).

a breadth and force that exceed that of the Double Jeopardy clause. Nothing in the Agreement supports Cumberbatch's construction. Article IV(e) of the Agreement provides that if a prisoner is returned to the sending jurisdiction without being tried on the receiving jurisdiction's indictment, that indictment "shall not be of any further force or effect, and the Court shall enter an order dismissing the same with prejudice." A dismissal with prejudice, in the context of this case, meant that Cumberbatch could not be charged with violating 18 U.S.C. §§ 2113(a), (b), or (d), the bases of the three counts in Indictment 73 Cr. 319. It did not preclude reindictment for other charges arising from the February 9, 1973 bank robbery.

That a dismissal with prejudice does not preclude reindictment on other charges is made clear by this Court's recent decision in *United States v. Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977). There, the defendant Ferro was tried on two indictments, one filed in 1974 and the other in 1975. These indictments, which contained a total of three counts, all charged Ferro with obtaining airline tickets with stolen credit cards in February, 1973; tickets were obtained on three separate occasions and on each occasion were resold to the same individual. Ferro had been brought from Ohio to New York for arraignment on the 1974 indictment and was then returned without being tried. This Court therefore ordered the 1974 indictment dismissed with prejudice. However, the Court held that prosecution under the 1975 indictment was proper, because Ferro had not been returned to state custody untried during the pendency of that indictment. Slip op. at 1745-46.

The precedent of *Cyphers* is controlling here. Although this Court found that prosecution of the defendant under a related indictment had violated the Agreement, that violation did not taint a second indictment brought after the violations took place. So here, the

violation of the Agreement that Judge Palmieri found to have taken place under Indictment 73 Cr. 319 cannot have tainted the prosecution of Indictment 76 Cr. 1076, filed after Cumberbatch had been returned to state custody. Cumberbatch's only rejoinder to this argument is that the two indictments in *Cyphers* described separate criminal transactions, whereas the two indictments here both contain charges arising out of the same transaction. (Br. 26). The distinction is illusory. The two indictments in *Cyphers* both described individual instances of a single fraudulent scheme, the obtaining of airplane tickets with stolen credit cards. Each of these transactions took place during the same month, February, 1973; each was proven at trial through the same witness, the individual to whom the tickets had been resold.

Although there are no cases construing the meaning of the "with prejudice" provisions of the Agreement, a dismissal with prejudice can surely have no greater preclusive effect on subsequent prosecutions than if the defendant had been placed in jeopardy on that indictment. If so, Cumberbatch could be prosecuted for conspiracy and possession of a firearm, the charges in the second indictment. In order for a subsequent indictment to be vulnerable under the double jeopardy clause, it must charge "the same offense in law and in fact." *United States v. Papa*, 533 F.2d 815, 820 (2d Cir. 1976). In this Circuit, it has been held that "whether offenses are the same under this standard is determined by applying the "same evidence test," that is, by examining whether the evidence required to support conviction in one of the prosecutions would have been sufficient to support conviction in the other prosecution." *United States v. Papa*, *supra*, 533 F.2d at 520, and cases there cited.

Cumberbatch obviously cannot meet this test. The statutes charged in the two indictments have different elements, and the evidence necessary to establish that they

have been violated differs. To cite an obvious example, establishing a violation of 18 U.S.C. § 924(c)(2) requires proof that the defendant was carrying a "firearm," 18 U.S.C. § 921(a)(3). A violation of 18 U.S.C. § 2113(d), however, is established simply if it is proven that the defendant used any "dangerous weapon or device." See *United States v. Crew*, 538 F.2d 575, 577-578 (4th Cir.), *cert. denied*, — U.S. — (Oct. 4, 1976); *Perkins v. United States*, 526 F.2d 688, 689-690 (5th Cir. 1976). Similarly, proof of conspiracy to commit bank robbery under § 371 would not suffice to prove that a bank robbery had been completed as required by § 2113(a) and (b). The double jeopardy clause would thus not bar prosecution under § 371 and 924(c)(2) even if Cumberbatch had been tried under an indictment charging violations of § 2113.*

The sole authority Cumberbatch invokes for his proposition is *Hilbert v. Dooling*, 476 F.2d 355 (2d Cir.), *cert. denied*, 414 U.S. 878 (1973). This Court, sitting *en banc*, held that a dismissal under the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases was with prejudice. The first indictment against Hilbert had been dismissed because the Government was not ready within six months; a second indictment, charging the same offense, was then filed and it was that indictment which the Court held to be barred by the earlier dismissal. The portion of the Court's opinion on which Cumberbatch

* Cumberbatch claims that the Government violated both the admonitions of this Court in *United States v. Jacobson*, 547 F.2d 21 (2d Cir. 1976) and the guidelines of the Justice Department that conspiracy charges not be prosecuted separately from the substantive offenses committed as part of the conspiracy. See *Maraker v. United States*, 370 U.S. 723 (1962); *Petite v. United States*, 361 U.S. 529 (1960). In all those cases, however, both the conspiracy and substantive indictments were separately taken to trial. Here, of course, Cumberbatch was not subjected to two separate trials concerning the same transaction, and thus the concerns that prompted the Solicitor General to move to dismiss in *Maraker* and *Petite* are not present here.

relies concerns Turnbull, Hilbert's co-defendant, *who did not join in the petition*. This Court observed, in a footnote, "[a]s to defendant Turnbull, *though we need not decide the issue*, the addition of a conspiracy count based on essentially the same transaction would not appear to be legally significant for the purpose of determining whether the charge should be dismissed under Rule 4 of the Prompt Disposition Rules." 476 F.2d at 357, n.5. (Emphasis added).*

Thus the portion of *Hilbert* that provides the principal underpinning for Cumberbatch's argument is pure dictum. Moreover, his argument overlooks the significant differences in the structure and purposes of the Agreement and the Second Circuit Rules. The Rules, as well as the various speedy trial plans that have succeeded them, were designed to expedite the processing of criminal cases from the first moment a defendant encounters the criminal justice system. Thus, the Government is required to be ready for trial within six months "from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried . . . whichever is earliest." (Rule 4, quoted at 476 F.2d at 355, n.1). Consequently, if the Government is not ready for trial within six months and an indictment is dismissed, the Government could not possibly be ready on any subsequent indictment within six months, because the starting point for the computation of time—whether an arrest, the filing of a complaint, etc.—would necessarily be the same on both indictments.

Finally, the Government asks this Court to examine, as Judge Palmieri did, the good faith in which Cumber-

* The quotation of this passage appearing in Cumberbatch's brief (Br. 26) omits the italicized words.

batch proffers this argument. In his brief, Cumberbatch makes much of the Government's supposed "circumvention" of the Agreement in the filing of a second indictment. As Cumberbatch well knows, we conceded before Judge Palmieri that the second indictment was filed in order to salvage some part of the prosecution against Cumberbatch in the face of the *Mauro* decision. Cumberbatch makes this decision appear the result of a calculated and cynical disregard for the Agreement. It was nothing of the sort. As Judge Palmieri recognized in his opinion, the Government had made repeated unsuccessful attempts to bring Cumberbatch to trial but Cumberbatch had thwarted these efforts by repeatedly seeking lengthy adjournments through his counsel—delays that resulted in Cumberbatch being returned to state custody, rather than being promptly tried, as the Government wished. (Palmieri opinion, p. 5).

Judge Palmieri's findings concerning Cumberbatch's efforts to delay this litigation are entitled to great weight and are amply supported by the record. *United States v. Pastor*, Dkt. No. 76-1364, slip op. 3633 (2d Cir., May 19, 1977). Similarly, it is clear that the Government did everything possible to move the case and to indicate to the judges to whom the case was assigned its interest in trying the case promptly. Less than two months after Cumberbatch was arraigned, the Government filed its notice of readiness for trial, on December 18, 1973. Two days after Cumberbatch's trial in the Bronx ended, on June 30, 1975, the Government informed Judge Duffy that it wished to try the case promptly. We again informed Judge Duffy of our readiness on September 9, 1975, and were ready for trial on the date later fixed by him, June 7, 1976.

Whereas the Government did everything possible to expedite this case, Cumberbatch did nothing. On the last two occasions he was brought to the Southern District of New York, September, 1975 and June, 1976, he was offered a speedy trial and instead sought adjourn-

ments. Moreover, Cumberbatch did nothing whatever to expedite the case in any other way. The first motion made on his behalf was filed August 13, 1976. His counsel never sought any pretrial discovery, and, indeed, never looked at a photospread containing Cumberbatch's picture which the Government had made available in September, 1975, until the trial began in December, 1976. At no time did Cumberbatch demand a speedy trial, nor did he ever express to the trial judge an interest in being promptly tried.

Because Cumberbatch persistently sought to delay these proceedings Judge Palmieri concluded that he "should not be permitted to avail himself of the benefits of the IAD." (Palmieri opin., p. 5). He further reasoned:

"Although the defendant has been afforded several opportunities for a speedy trial, he has, through his counsel, repeatedly sought lengthy adjournments. In fact, the Government's failure to comply with the IAD in June of 1976 was in part caused by Cumberbatch's attorney's failure to make himself available for the June 7 trial which Judge Duffy had set. These delays have directly served the defendant's trial tactics which have thoroughly exploited the passage of time, the alleged inconsistencies among government witnesses, and the Government's alleged failure to sustain its burden of identifying the defendant at the scene of the bank robbery. Since Cumberbatch has repeatedly obstructed the 'expeditious and orderly disposition' of this case, it is highly inappropriate to permit him to take advantage of a statute whose purpose is to encourage such a disposition" (Palmieri opinion, p. 5).

Of the two objectives of the Agreement that are articulated in its first Article, Cumberbatch manifestly thwarted "the expeditious and orderly disposition" of the

Government's charges against him. One must question, further, whether anything the Government has done during this litigation has disrupted the "program of prisoner treatment and rehabilitation" to which he has been subject. Prior to his trial, Cumberbatch was brought to the Southern District only for brief periods and immediately returned to state custody. Any disruption in his program of rehabilitation was likely to have been minimal. Far more disruptive, in all likelihood, were the repeated transfers within the New York State prison system which Cumberbatch underwent.* Under such circumstance, it verges on the ludicrous to contend that the federal writs have created any serious prejudice to any program of rehabilitation. Indeed, Cumberbatch claims no prejudice whatever. See Palmieri opinion, p. 6.

Article IV(e)'s requirement that a state prisoner brought to Federal Court be tried before his return to state custody is not a constitutional bulwark but rather a requirement whose apparent policies have, as indicated, absolutely no applicability to Cumberbatch. An expansive interpretation of Article IV(e), that is, one that would, in the circumstances of this case, preclude reindictment for any crime arising out of the same criminal transaction, would do much to abet the regrettably prevalent public perception that meaningless technicalities often free demonstrably guilty men. Cf. *United States v. Artieri*, 491 F.2d 440, 445-46 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974).

* The last three writs of *habeas corpus* that produced Cumberbatch in the Southern District of New York were addressed to different New York prisons: the writ for September 9, 1975, was addressed to the Clinton Correctional Facility, Dannemora, New York; the writ for June 7, 1976 was addressed to the Auburn Correctional Facility, Auburn, New York; the writ for December 13, 1976 was addressed to the Attica Correctional Facility, Attica, New York.

POINT II

Cumberbatch Was Properly Charged With a Violation of 18 U.S.C. § 924(c)(2).

Cumberbatch argues (Br. 27-28) that he was improperly charged in Count 2 of Indictment 76 Cr. 1076 with possession of a firearm during the commission of a felony in violation of 18 U.S.C. § 924(c)(2). This argument relies exclusively on the Eighth Circuit's opinion in *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976), which held that a crime for which the penalty is enhanced if a dangerous weapon is used cannot serve as the predicate felony in a prosecution under 18 U.S.C. § 924(c)(1).

Eagle was wrongly decided and should not be followed by this Court. The reasoning of *Eagle* has already been rejected in two Circuits and by a District Court in a third. See *United States v. Crew*, 538 F.2d 575 (4th Cir.), cert. denied, — U.S. — (Oct. 4, 1976); *Perkins v. United States*, 526 F.2d 688 (5th Cir. 1976); *United States v. Hearst*, 412 F. Supp. 877 (N.D. Cal. 1976). In each of those decisions, it was held that an indictment could properly charge violations of both § 2113 and § 924(c)(2). The *Crew* court reasoned that an indictment may charge two separate offenses arising from a single transaction so long as each offense requires proof of a fact not essential to the other. *Pereira v. United States*, 347 U.S. 1 (1959). Because § 2113(d) and § 924(c)(2) contain different elements of proof, prosecution under both statutes is permissible. As the Court pointed out in *Perkins*, 526 F.2d at 690, proof of a violation of § 924(c)(2) requires not only proof of all of the elements of § 2113(d), but also proof that a defendant carried a "firearm" and that he carried it unlawfully. Both *Crew* and

Perkins also held that a defendant could be separately sentenced for violations of § 2113 and § 924(c)(2).*

Quite apart from its failure to gain acceptance in other Circuits, the logic of *Eagle* is insupportable. 18 U.S.C. § 924(c)(2) is utterly unambiguous on its face: it makes guilty of a crime anyone "who carries a firearm unlawfully during the commission of *any* felony for which he may be prosecuted in a court of the United States." (Emphasis supplied). Despite the clarity of the language, the *Eagle* court came to the conclusion that "any felony" excluded felonies, such as 18 U.S.C. §§ 1153 and 2113, which provided enhanced penalties for the use of a gun. In reaching this conclusion the Court viewed as authoritative the views of the sponsor of the statute, Representative Poff. 539 F.2d 1171. The views of a single legislator cannot be deemed expressive of the intent of the entire legislature, particularly when the statute is as free of ambiguity as § 924(c)(2) is.** We

* In addition, numerous decisions exist in which convictions were affirmed under both § 2113 and § 924(c)(2), although it does not appear that the impropriety of proceeding under § 924(c)(2) was raised in any of the prosecutions. See *United States v. Bussey*, 507 F.2d 1096 (9th Cir. 1974); *United States v. Orand*, 491 F.2d 1173 (9th Cir.), *cert. denied*, 414 U.S. 1006 (1973); *United States v. West*, 486 F.2d 468 (6th Cir. 1973), *cert. denied*, 416 U.S. 955 (1975); *United States v. Savage*, 482 F.2d 1371 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *United States v. Forrester*, 434 F.2d 69 (5th Cir. 1970).

** In construing other gun control statutes, both this Court and the Supreme Court have had occasion to reject the views of the sponsor of the legislation. In *United States v. Bass*, 404 U.S. 336 (1971), the Court concluded that a conviction under 18 U.S.C. App. § 1202(a) required a showing that a convicted felon possessed a weapon "in commerce or affecting commerce." In so ruling, the Court rejected the views of Senator Russell Long, the proponent of the legislation, that the statute was intended to reach any convicted felon in possession of a firearm. 404 U.S. at 345-347. The dissenting opinion of Justice Blackman in *Bass* argued that Senator Long's views on the meaning and purpose of the legislation should be controlling.

[Footnote continued on following page]

submit that neither the interpretation by the Eighth Circuit nor that by Representative Poff should be followed.

Finally, this Court need not even reach the issue of whether simultaneous prosecutions for violations of §§ 2113 and 924(c)(2) may be maintained, since the indictment under which Cumberbatch was convicted charged only violations of §§ 371 and 924(c)(2). It did not allege a violation of § 2113(d), which is the subsection of the bank robbery statute that provides for increased penalties if a weapon is used in the course of a robbery. That statute was only charged in Indictment 73 Cr. 319, on which Cumberbatch was never tried. Thus, even if the Court were to accept the Eighth Circuit's reasoning in *Eagle*, it would not control here. The views of Representative Poff, adopted in *Eagle*, were prompted by the apparent unfairness of subjecting a defendant to two separate—and perhaps consecutive—penalties for the use of a firearm. Cumberbatch has not been subjected to the risk of double punishment, and indeed the punishment he did receive under § 924(c)(2) was far less than the maximum available under § 2113(d).

Similarly, in *United States v. Bell*, 524 F.2d 202 (2d Cir. 1975), this Court held that a conviction under § 1202(a) required the further showing that a convicted felon had possessed a weapon while it was traveling in interstate commerce. When the Government relied on the views of Senator Long in support of a broader reading of the statute, this Court, citing *Bass*, disclaimed reliance on his views. 524 F.2d at 208.

POINT III

The Government Introduced Sufficient Evidence To Establish That Cumberbatch Carried A Firearm Unlawfully Within The Meaning Of 18 U.S.C. § 924 (c)(2).

Cumberbatch argues that the Government failed to meet its burden of proof under Count 2 of the indictment, which charged a violation of 18 U.S.C. § 924(c)(2). Specifically, he alleges that the Government failed to prove both that he was carrying a "firearm", and that he carried it unlawfully. Cumberbatch also argues that Judge Palmieri's instructions to the jury improperly foreclosed consideration of whether he carried a "firearm". Each of these arguments is meritless.

Cumberbatch argues that the Government failed to prove that his weapon was a firearm because the Government's expert, Robert Scroggie, was unable to examine it. The unstated premise of Cumberbatch's argument is that the only proof that will satisfy the statute is the introduction of the weapon in evidence coupled with the testimony of an expert who has test fired it. This contention misconceives the requirements of the statute and overlooks the relevant case law, as well as common sense.

18 U.S.C. § 921(a)(3) defines "firearm" as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" or "the frame or receiver of any such weapon." Thus, the Government need not prove that the weapon carried was operable; it need only prove that it was *designed to* expel a projectile or capable of being converted to that condition. Consequently, the Government's task was to adduce sufficient proof that what Cumberbatch was carrying in the bank was a genuine weapon rather than a toy or a home made mock-up. As with any aspect of the Government's proof, this element may

be established circumstantially; it is not necessary that the weapon be placed in evidence or that it be test fired. In *United States v. Liles*, 432 F.2d 18 (9th Cir. 1970), the weapon had not been placed in evidence nor had any Government witness attempted to fire it. The Court nevertheless found that its identity as a firearm had been sufficiently established circumstantially, that is, through the testimony of witnesses who had observed the weapon and concluded that it was a genuine revolver. See also *United States v. Samson*, 533 F.2d 721 (1st Cir. 1976).

The Government's evidence that Cumberbatch's weapon was a firearm was overwhelming. Scroggie's qualifications as an expert were not subject to challenge. He was shown exceedingly clear photographs (GX 43, 45, 46, 48, 51-54), one of which (GX 54) displayed virtually the entire weapon. On the basis of his examination of the photographs, Scroggie concluded the weapon was a Commando Mark III .45 caliber semi-automatic carbine. (Tr. 257). He also identified the frame of the weapon in a photograph. (Tr. 270). Scroggie's knowledge of such weapons was extensive; he testified that when the weapon was first manufactured in the early 1970's models were sent to the Bureau of Alcohol, Tobacco & Firearms for examination, at which time Scroggie personally examined the weapon. (Tr. 268). He also explained that he could differentiate the Commando Mark III from similar models by the existence of a muzzle compensator and the positioning of the grips and magazine well, all of which appear clearly in the photographs. (Tr. 278-79). Scroggie also identified a photograph of the Commando Mark III in an advertisement that was placed in evidence. (Tr. 270-72; GX 75).*

* Scroggie also stated that to his knowledge no replicas of the Commando Mark III had ever been manufactured. He defined a replica as an inoperable "toy" that duplicated a genuine firearm. (Tr. 272-75).

Scroggie's testimony was buttressed by that of two witnesses who had an opportunity to observe the weapon during the robbery. Bolla, the manager, who was only a few feet from Cumberbatch, testified that Cumberbatch was carrying "an automatic weapon." (Tr. 174). Randall testified that while he was prostrate on the floor, the man kneeling next to him stealing his wallet was carrying a gun with a barrel at least eight inches long. (Tr. 237). Moreover, he stated that he was hit on the back of the head "with something which was very hard". (Tr. 236). That observation alone substantially diminishes the likelihood that Cumberbatch was carrying a plastic toy or a wooden mock-up. In sum, the jury had before it clear photographs of the weapon,* the testimony of an expert,** and the observations of two victims of the robbery. In addition, the jury was entitled to evaluate the likelihood that a robbery as carefully orchestrated as this one, which involved, *inter alia*, the disarming of a bank guard and the systematic robbing of customers and bank personnel, would be committed with toy weapons.***

* In GX 55, for example, the resolution in the photograph is sufficient that the grooves on the barrel of the gun are clearly visible.

** Cumberbatch argues (Br. 32) that the conviction must be reversed because the Government's expert had no opportunity to examine the questioned weapon. He cites, in support, *J. Gerber & Company v. S. S. Sabine Howaldt*, 437 F.2d 580 (2d Cir. 1971), which is wholly inapplicable; it merely holds that an expert's testimony that is based on hypothetical questions which misstate crucial facts is meaningless. The law is settled that an expert witness need not have first hand knowledge of the subject about which he testifies. See *Nanda v. Ford Motor Company*, 509 F.2d 213, 221 (7th Cir. 1974); F.R. Evid. 703.

*** In a highly analogous area, this Court has held on numerous occasions that the Government may meet its burden of demonstrating that transferred substances are in fact narcotics through circumstantial evidence, and neither the drugs themselves nor a chemist's analysis is necessary. See, e.g., *United States v. Morello*, 250 F.2d 631, 633-34 (2d Cir. 1957); *United States v. Agueci*, 310 F.2d 817, 828 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States v. Iacopelli*, 483 F.2d 159, 161-62 (2d Cir. 1973).

Cumberbatch next claims that Judge Palmieri improperly took from the jury the issue of whether the weapon was a "firearm". Any careful examination of the Court's charge makes clear that he did not. Judge Palmieri's charge on Count 2 (Tr. 533-538), was, in itself unexceptionable and in no way exceeded the limits of the court's authority to comment on evidence. *United States v. Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). However, when defense counsel objected to the court's charge, Judge Palmieri gave a supplemental charge that made absolutely clear that factual findings were solely the jury's province. (Tr. 582-84).

Cumberbatch also argues that the Government introduced insufficient evidence that he was carrying the firearm "unlawfully," as defined in *United States v. Ramirez*, 482 F.2d 807, 814-815 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973). The Government's proof was clearly sufficient. It was stipulated at trial that the New York City Firearms Control Board had never issued to Cumberbatch a permit for possession of a Mark III Commando rifle. (Tr. 336c). In addition, Judge Palmieri took judicial notice * of § 436-6.6 of the Administrative Code of the City of New York, which requires the issuance of a permit for the possession of rifles and shotguns. (Tr. 537).**

Cumberbatch argues that the Government's proof was inadequate because the New York City Admin. Code requires only a general permit, whereas the Government proved (in the stipulation) that Cumberbatch lacked a permit for a specific weapon. This argument misstates the nature of the statutory scheme governing the possession of rifles in New York City. § 436-6.6 and § 436-6.9

* See *United States v. Rivero*, 532 F.2d 450 (5th Cir. 1976).

** Proof that a weapon was carried in violation of state law or municipal ordinance is sufficient under § 924(c)(2). See *United States v. Howard*, 504 F.2d 1281 (8th Cir. 1974).

of the Admin. Code, which are reproduced in the Appendix to this brief, establish requirements for possession and registration, violation of either of which is a misdemeanor punishable by imprisonment for one year or a five hundred dollar fine. Admin. Code § 436-6.14. Given this scheme, the stipulation was sufficient to establish that Cumberbatch's possession was unlawful. If, as the stipulation stated, the New York City Firearms Control Board did not issue Cumberbatch a permit for a Mark III Commando rifle, it necessarily follows that it issued him no permit for the possession of rifles at all.*

POINT IV

The Government's Notice of Readiness Was Timely Filed.

Cumberbatch argues that Judge Palmieri should have dismissed Indictment 76 Cr. 1076 because the Government failed to file a timely notice of readiness for that indictment as required by Rule 7 of the Plan for Prompt Disposition of Criminal Cases of the United States District Court for the Southern District of New York (hereafter, "the Plan"). The argument is meritless.

* For reasons not altogether clear, Cumberbatch appends to that portion of his brief dealing with the sufficiency of the Government's proof under § 924(c)(2) a one sentence argument alleging that the Government failed to prove that the bank was insured by the Federal Deposit Insurance Corporation. (Br. 35). Bolla, the bank manager, testified that the bank was federally insured and that the branch contained notices announcing F.D.I.C. insurance. (Tr. 187-89). In addition, the Government offered a copy, see F.R.Evid. 1001, of the F.D.I.C. certificate issued to the First National City Bank. That is clearly sufficient to establish F.D.I.C. insurance. *United States v. Wingard*, 522 F.2d 796, 797 (4th Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States v. Hamilton*, 475 F.2d 512, 514 (6th Cir. 1973); *United States v. Riley*, 435 F.2d 725, 726 (6th Cir. 1970); *United States v. Skiba*, 271 F.2d 644 (7th Cir. 1959), *cert. denied*, 362 U.S. 924 (1960).

The Government's notice of readiness for Indictment 73 Cr. 319 was filed December 18, 1973, within two months of Cumberbatch's arraignment. That notice was, as Judge Palmieri observed, "unquestionably timely." (Palmieri opinion p. 12). The Government notified Judge Palmieri of its readiness on Indictment 76 Cr. 1076 by letter on November 23, 1976, the day on which the indictment was filed. (Palmieri opinion, p. 12). That notice was also obviously timely, and further demonstrates that the filing of the superseding indictment did not delay Cumberbatch's trial by even so much as a day.

The Southern District Plan does not directly address the question of when a notice of readiness for a superseding or related indictment must be filed. It does, however, address the far more serious question of when such an indictment must be tried. Rule 5(d)(2) requires, in essence, that a subsequent indictment be tried within the time limit set for the commencement of trial on the original indictment. Under Rule 5(a)(1), indictments on which arraignment occurred prior to July 1, 1976 had to be tried by January 1, 1977. Accordingly, both indictments had to be tried prior to January 1, 1977. Judge Palmieri found (Palmieri opinion, p. 12) that because the trial of Indictment 76 Cr. 1076 had commenced by December 13, the Government had complied with the readiness requirement. Judge Palmieri's reasoning is clearly valid. If Cumberbatch's argument were accepted by this Court it would mean that an indictment timely tried was dismissed because the Government was not timely ready. Cumberbatch's reasoning would also lead to the absurd result that the Government could under no circumstances file a superseding indictment six months after arrest—a conclusion that finds no support in the policies underlying the plan, especially where, as here,

the superseding indictment caused no delay or prejudice to the defendant.*

Finally, even if the Government did not comply with the Plan's readiness requirements, dismissal of the indictment is not required. Rule 11(c) of the Plan vests the District Court with discretion in determining whether or not to dismiss the indictment in the event of the Government's failure to be ready. In his opinion, Judge Palmieri made clear that were he called upon to exercise his discretion, he would decline to order a dismissal. He stated: "in light of the history of the defendant's efforts to delay this trial, it would be wholly inappropriate for this court to dismiss the present indictment for the Government's failure to file a timely notice of readiness . . ." (Palmieri opinion, p. 12).**

* Cumberbatch's argument is also internally inconsistent. He argues that the starting point for computation of the readiness requirement on a subsequent indictment must relate back to the starting point of the original indictment. Thus, he argues, Cumberbatch's second indictment must have the same starting point as his first, October 26, 1973. If that argument is correct consistency would require that the first notice of readiness filed—on December 18, 1973—should be equally applicable to both indictments. Although Cumberbatch is willing to assign the same starting point to both indictments, he is unwilling to assign the same notice of readiness to both.

** Cumberbatch proffers a second argument based on the Plan that was also rejected by Judge Palmieri. He argues (Br. 37-38) that Indictment 76 Cr. 1076 should have been dismissed because it was not timely filed. This argument overlooks the provisions of Rule 5(d) of the Plan, which govern superseding and related indictments. Rule 5(d) 5 provides:

(5) The time within which an indictment or information must be obtained on the subsequent charge, or within which an arraignment must be held on such charge, shall be determined without regard to the existence of the original indictment or information.

This rule makes clear that the pendency of an earlier indictment has no bearing on the time within which a subsequent or super-

[Footnote continued on following page]

POINT V**Judge Palmieri's Comments And Rulings Did Not Deny Cumberbatch A Fair Trial.**

Cumberbatch claims that he was denied a fair trial by various rulings and comments made during the trial by Judge Palmieri. He also claims to have been victimized by an "attitude of hostility" that Judge Palmieri manifested throughout the trial.

As should be clear from the statement of facts, the evidence against Cumberbatch was as overwhelming as any defendant in a bank robbery prosecution is likely to confront. It consisted not only of surveillance photographs which even defense counsel conceded "greatly resembled" Cumberbatch (Tr. 454, 478), but also of two objects that bore Cumberbatch's fingerprints, one discovered inside the bank after the robbery and the other discovered in the getaway car. In addition, one eyewitness, Bolla, picked out Cumberbatch in a photospread and identified him in court. Faced with evidence that established his client's guilt to a mathematical certainty, defense counsel obviously decided that the only available course was to attempt to antagonize Judge Palmieri into reversible error or to introduce as many inflammatory and irrelevant issues as possible.

The antagonizing of Judge Palmieri began at the very outset of the trial, when defense counsel sought writs of *habeas corpus ad testificandum* for Raul Estremera and

sedition indictment must be filed. Cumberbatch's construction of Rule 3 would require that *all* superseding indictments be filed within sixty days of a defendant's arraignment on the original indictment.

Even if Cumberbatch is correct and the second indictment should have been filed by September 1, 1976, dismissal of the indictment is not required. See Rule 11(e).

Pedro Mario Monges, two convicted co-defendants. This was justified by the assertion that "I have been led to believe these people are in a position to exculpate Mr. Cumberbatch." (Tr. 15). Although the assertion was incredible on its face, Judge Palmieri granted the writs, which involved the not inconsiderable expense of flying Estremera and several U.S. Marshals from the State of Washington to New York. Cumberbatch, of course, called neither individual as a defense witness. Defense counsel further sought to antagonize the trial court by admonishing him for arriving late (Tr. 150) and by laughing during the testimony of various witness (Tr. 320-21). He also made several patently frivolous objections during the prosecutor's summation (Tr. 410, 418, 426). Cumberbatch now claims prejudice in Judge Palmieri's direction that he cease laughing (Tr. 320) or in his efforts to curtail frivolous objections. (Tr. 426). A fair reading of the relevant colloquies between the court and counsel indicates only that the defense did its best to provoke Judge Palmieri, who in turn did his best to resist the provocation.

Aside from baiting the trial judge, defense counsel's other principal tactic was to place the F.B.I. on trial and to inject irrelevant political issues into the case. In his opening, he stated that the evidence would show that "the FBI, using procedures that we have come to know, decided that they were going to make sure Mr. Cumberbatch got convicted of this crime." (Tr. 169). During the cross-examination of FBI Agent Robert McCartin, who testified only to the simple fact of finding a newspaper (later found to bear Cumberbatch's fingerprints) in a getaway car, defense counsel asked whether he had previously worked in cases involving those he believed to be "black militants." (Tr. 326). He also asked McCartin whether he had participated in the arrest of Angela Davis (Tr. 327), a question with no discernible relevance to the facts at issue. McCartin was also asked whether L. Patrick Gray was the head of the FBI in February,

1973 (Tr. 328), an equally irrelevant inquiry. During the cross-examination of the fingerprint expert, defense counsel pointed out that one of the pages bearing a fingerprint of Cumberbatch contained a story about Daniel Ellsberg's trial. (Tr. 360). Furthermore, in his summation, defense counsel accused the two FBI agents who had found the newspapers bearing Cumberbatch's fingerprints, Janson and McCartin, of lying and of attempting to "frame" Cumberbatch. (Tr. 457-58).*

It is in the context of these remarks that Judge Palmieri's rulings must be considered. Cumberbatch argues that Judge Palmieri's comments on his assertion that he was "framed" by the FBI effectively "negated" the defense. We invite the Court's perusal of that portion of Judge Palmieri's charge (Tr. 548-51), for we submit that there was nothing improper in it. Judge Palmieri was certainly entitled to inform the jury that the charge of framing Cumberbatch was a "serious" one (Tr. 548), and to instruct the jury that if they believed that the agents were bent on framing Cumberbatch, to disregard

* He argued as follows:

"But suppose for the sake of argument that the FBI, particularly Mr. McCartin and Mr. Janson, believe that Mr. Cumberbatch was such a person. Do you think in view of common sense or what we have come to learn from the past of the activities of the FBI in or about 1973, do you think it is beyond them to take some newspapers from some other location and submit them to the FBI for analysis. Do you think it is beyond them to get them from a place where they know certain people have been, particularly Mr. Cumberbatch, and send them to Washington and say falsely they came from the bank or from a particular vehicle?

Do you think it is beyond the FBI, not the FBI as we used to think it was but as we have come to know in our common sense what the FBI is, what they have been able to do and been to get away with in recent years?" (Tr. 457-58).

their testimony. (Tr. 548). It is clear, furthermore, that Judge Palmieri placed the issue of the agent's perjury squarely before the jury, and never sought to foreclose their consideration of the subject. (Tr. 551).

Judge Palmieri's comments on this defense were well within the latitude permitted a trial judge to comment on the evidence. *United States v. Lombardi*, 550 F.2d 827 (2d Cir. 1977); *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2067-8 (2d Cir., Feb. 28, 1977); *United States v. Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). It was thus entirely proper for the court to instruct the jury not to be diverted by the insertion of irrelevances such as the Ellsberg trial or the role of L. Patrick Gray (Tr. 556-57). Similarly, analogizing the facts in the case to a "mosaic" in no way prejudiced Cumberbatch or suggested in which direction the jury's verdict lay.

Nor did Judge Palmieri err in precluding questions addressed to Agent McCartin that sought to probe his biases against black militants. (Tr. 326-331a). The scope of cross-examination is a matter customarily entrusted to the sound discretion of the trial judge. *United States v. Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976); *United States v. Green*, 523 F.2d 229, 237 (2d Cir.), *cert. denied*, 423 U.S. 1074 (1975); *United States v. Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). The trial judge's rulings in this area are entitled to "great deference" and are subject to reversal only for clear abuse of discretion. *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). Judge Palmieri scarcely abused this discretion. There was no proof whatever introduced at trial that Cumberbatch was a "black militant" or that he was regarded as such by the FBI at the time of the

bank robbery. Moreover, any bias McCartin entertained against Cumberbatch was adequately probed. In response to Judge Palmieri's questions, McCartin stated that he entertained no prejudice against Cumberbatch and did not even know him. (Tr. 328).

Cumberbatch's exceptions to Judge Palmieri's other rulings are equally meritless. He takes issue with the court's remarks that FBI reports were provided to the defense by the Government and were not admissible in evidence. We are unable to discern the impropriety in those remarks, particularly when *United States v. Gardin*, 382 F.2d 601, 605 (2d Cir. 1967), obligates defense counsel to advise the jury that he is making use of reports which the Government is required by law to furnish him.

Nor was there any possible prejudice to Cumberbatch in the admission into evidence of labels (GX 72A, 73A, 73B, 73C) that the F.B.I. fingerprint expert had affixed to the two newspapers (GX 72, 74) submitted to him for examination. Judge Palmieri elicited from the expert that he had no personal knowledge of where the newspapers were found and proceeded to instruct the jury that the labels were not evidence of the source of the newspapers (Tr. 341-43). This situation thus differs markedly from that in *United States v. Frattini*, 501 F.2d 1234 (2d Cir. 1974), where the trial court admitted into evidence laboratory reports that identified the defendant as a source of cocaine. In *Frattini*, the court never instructed the jury to disregard the report as hearsay, as Judge Palmieri did here, and indeed the prosecutor stressed the probative value of the report in his summation.

Finally, Cumberbatch claims that Judge Palmieri erred in not ordering the Government to turn over its entire FBI file to defense counsel. (Tr. 408-09). Cumberbatch claims that this file "apparently did contain the search warrants returns" (Br. 42) executed by McCartin after

a search warrant was obtained from a magistrate in the Eastern District of New York. There are several obvious responses to this claim. First, the file did *not* contain the return on the February 15, 1973 search warrant. It was marked as Court's Exhibit 4 and has been retained for this Court's persual. Second, the return on a search warrant is a public record, maintained in the files of the United States District Court for the Eastern District of New York, to which defense counsel had access. Thus, the Government did not and could not have "withheld" such information. Third, defense counsel had obviously gained access to the search warrant itself, for he introduced it as a defense exhibit. (Tr. 333-34). If he knew of the existence of the search warrant prior to trial, he surely knew of, and could have obtained, the return. His argument that the Government "withheld" this information is therefore frivolous.

POINT VI

The In-Court Identification of Cumberbatch By a Government Witness Was Not the Product of Undue Suggestion.

Prior to trial Judge Palmieri conducted a hearing pursuant to *Simmons v. United States*, 390 U.S. 377 (1968) at which both the witness Bolla and John Brown, the detective who had shown him the photospread, testified. (Tr. 79-117, 131-53). At the conclusion of the hearing, Judge Palmieri ruled that the photospread containing Cumberbatch's photograph was shown in a proper fashion and that his selection of Cumberbatch in the spread was not the product of undue suggestion. (Tr. 161-62). Those findings have not been challenged on appeal.

Despite the fairness of the initial identification procedures employed, Cumberbatch claims that it was unfair to permit Bolla to view him seated at the defense

table. He describes this procedure as an "in-court show-up", a term of his own devising. Although there can be little question that out of court showups are disfavored, see *Stovall v. Denno*, 388 U.S. 293 (1967), no court has ever held that a witness may not view a defendant seated alone in a courtroom. See *United States v. Dobson*, 512 F.2d 615, 616 (6th Cir. 1975); *United States v. Hamilton*, 469 F.2d 880, 883 (9th Cir. 1972); *United States v. Moss*, 410 F.2d 386, 387 (3rd Cir.), *cert. denied*, 396 U.S. 993 (1969); cf. *Brathwaite v. Manson*, 527 F.2d 363, 367, n.6 (2d Cir. 1975), *cert. granted*, 425 U.S. 957 (1976).*

Also fatal to Cumberbatch's argument is his counsel's failure to object to Bolla's method of in-court identification. No objection to this procedure was raised before or during Bolla's testimony, and defense counsel never asked to have Cumberbatch seated elsewhere in the courtroom or to have other individuals with a similar appearance seated at the defense table.** Although Cumberbatch claims in his brief (Br. 43) that his counsel requested an "in-court" lineup, the record reveals otherwise. He simply requested a lineup, and there was no reference in the colloquy that ensued (Tr. 123-26) to this lineup being held before the jury. The clear implication of the remarks of both defense counsel and the trial court was that the lineup requested was one to be conducted in the normal fashion, i.e., at the F.B.I. or a police station.

* Indeed, since Bolla's prior identification would have been admissible even if his in-court identification had been suppressed, see F.R. Evid. 801(d)(1)(C), and would have carried with it extraordinary probative weight, see *Brathwaite v. Manson*, *supra*, 527 F.2d at 367, n. 6, a failure to preclude the in-court identification would in any event be harmless.

** The defense did ask that during the *Simmons* hearing Cumberbatch be seated at a place in the courtroom where Bolla would be unable to see him. Judge Palmieri granted that request (Tr. 77-78). Accordingly, Bolla did not have an opportunity to view Cumberbatch prior to his trial testimony.

Cumberbatch also claims that Judge Palmieri erred in denying his request for a lineup. A similar claim was made before this Court by Estremera, his co-defendant, and rejected there. *United States v. Estremera, supra*, 531 F.2d at 1111; *United States v. Boston*, 508 F.2d 1171, 1176-1177 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Ravich*, 421 F.2d 1196, 1203 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). This Court observed that "[c]ompared with the permissible photographic identification made a few days after the robbery when memory was fresh, a live line-up two years later, when memories had probably dimmed, could claim little if any advantage . . ." 531 F.2d at 1112. That observation applies here with equal force. Finally, Judge Palmieri was justified in denying the lineup request simply because it was untimely. As defense counsel acknowledged (Tr. 128-30), he was advised by the Government on or about September 26, 1975 that photospreads had been shown and an in-court identification would be attempted. In a gesture characteristic of all of his efforts to "expedite" this trial, he did not move for a lineup until December 13, 1976, the day the trial was due to commence. In contrast, Estremera's counsel moved for lineup two weeks prior to trial. 531 F.2d at 1111, n.5. If the denial of a lineup was proper there, it was *a fortiori* proper here.

Cumberbatch also claims that Bolla's selection of his photograph on March 5, 1973, was the product of impermissible suggestion because Bolla had been shown surveillance photographs prior to his being shown the photospread. According to Bolla (Tr. 224), he was shown the surveillance photographs three to five days after the robbery. This display could not have conceivably influenced Bolla's choice of Cumberbatch's photograph three weeks later. Nevertheless, *United States v. Evans*, 484 F.2d 1178, 1186 (2d Cir. 1973) makes clear that the procedures followed here were proper.

Cumberbatch also perceives some impropriety in the prosecutor's closing argument. In his summation, defense counsel had argued that Bolla's in-court identification of Cumberbatch was inevitable because he had been seated at the defense table. (Tr. 450). In his rebuttal summation, the prosecutor simply responded that defense counsel could have seated Cumberbatch anywhere in the courtroom, but chose to keep him at the defense table in order to argue that an identification was inevitable. (Tr. 486). We submit that this was an entirely proper response, and indeed Judge Palmieri so found in overruling a defense objection to the argument. (Tr. 486-87). Judge Palmieri pointed out quite correctly that he had permitted Cumberbatch to be seated in the back of the courtroom during the *Simmons* hearing (Tr. 77-78) and he would have permitted a similar procedure at trial.

Finally, Cumberbatch argues that the Government violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose to the defense the entire photospread shown to Bolla on March 5, 1973, as well as a statement Bolla claimed to have signed identifying the photograph of Cumberbatch. At the *Simmons* hearing, Bolla testified that he had been shown approximately twelve photographs on March 5, 1973, and that he had given the police a signed statement. (Tr. 105, 108). Brown, the detective who showed Bolla the photos, testified that only six photographs were shown and that Bolla had not written out a statement. (Tr. 132-33, 142). When the Government became aware that Bolla's recollection of the incident differed from Brown's,* it directed

* Bolla's recollection of the display of the Cumberbatch photospread had, in all likelihood, been distorted by the frequency with which photospreads involving each of the robbers had been shown to him. As the person in the bank with the best view of the robbery, he was the individual most frequently sought by law enforcement officers for identifications. Thus, Bolla selected

[Footnote continued on following page]

the F.B.I. agent in charge of the case to search the police files for evidence of additional photographs or a statement. As the prosecutor informed the Court, he found nothing. (Tr. 160). Defense counsel conceded (Tr. 160) that he was not accusing the prosecutor of "hiding" anything. For reasons not altogether clear, Cumberbatch nevertheless presses this argument on appeal.

POINT VII

The Sentence Imposed by Judge Palmieri Was in all Respects Proper.

Cumberbatch first argues that Judge Palmieri employed "improper criteria" in denying him the benefits of the Youth Corrections Act, 18 U.S.C. § 5010. *Dorszynski v. United States*, 418 U.S. 424 (1974), requires a district judge to make an express finding that a defendant will not benefit from the provisions of the Act, but does not require that he give supporting reasons. Judge Palmieri not only made the express finding required by *Dorszynski*, but also set forth reasons that were amply supported by the record. (Tr. 639-40).

Cumberbatch further claims that the fifteen year sentence he received was improper because it was intended to conform as closely as possible to the sentences imposed on Monges, Estremera, and Washington, all of whom were convicted of bank robbery. He also claims that although he

a photograph of Washington from a spread on February 22, 1973, and selected a photograph of Monges and another individual from another photospread on February 26, 1973. (Tr. 114-15). In addition, he was shown photospreads that included Estremera's picture prior to his trial in 1975. (Tr. 115). Bolla did give the F.B.I. a signed statement when he identified Washington's photograph. (Tr. 115). It is entirely possible that he confused that occasion with the display of the Cumberbatch photospread on March 5, 1973.

was convicted only of conspiracy and possession of a firearm, the severity of his sentence was commensurate with a bank robbery conviction. Neither of the contentions makes the sentence imposed improper. The evidence before Judge Palmieri disclosed that Cumberbatch participated in a bank robbery, and he was certainly entitled to consider that in imposing sentence. *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973) permits the sentencing judge to consider offenses charged in dismissed counts of an indictment, and *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972) entitles the court to consider evidence of crimes of which the defendant was acquitted. It follows a *fortiori* that Judge Palmieri was entitled to consider crimes proven at trial by overwhelming evidence, even if not charged in the indictment. Finally, we are unable to see the harm in making Cumberbatch's sentence conform to those imposed on his co-defendants. Cumberbatch was at least as culpable as they, and he alone savagely and repeatedly beat a bank employee with the barrel of a rifle. The sentence imposed can scarcely be deemed excessive, for this Court has now twice rejected challenges to the severity of the sentences imposed on two of the co-defendants. See *United States v. Estremera*, *supra*, 531 F.2d at 1113; *United States v. Washington*, 490 F.2d 1406 (2d Cir. 1974).

Cumberbatch also argues that his sentence must be vacated because Judge Palmieri relied on a state conviction that has now been reversed. Cumberbatch neglected to inform this Court, one assumes inadvertently, that his state conviction was reversed only in part. A reading of the Appellate Division's opinion in *People v. Cumberbatch*, — A.D. 2d —, N. Y. L. Journal, March 28, 1977 (1st Dept. 1977),* discloses that Cumberbatch was con-

* No citation to this opinion appears in Cumberbatch's brief, nor was a copy included in the papers submitted in this Court.

victed of two offenses after his trial in the Supreme Court, Bronx County. He was convicted of armed robbery, for which he received a sentence of $8\frac{1}{2}$ to 25 years, and of possession of a weapon as a felony, for which he received a concurrent sentence of seven years. The Appellate Division reversed the armed robbery conviction and affirmed the conviction for possession of a weapon but remanded the latter for resentencing. Hence one of Cumberbatch's state convictions still stands, a fact mentioned nowhere in his brief.

Cumberbatch is not entitled to a vacation of his sentence because he has not raised the point in the district court. The law is clear that a sentence must be set aside if the trial court relied on materially incorrect information, *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970). However, the question of whether there was reliance on the state robbery conviction should be addressed, in the first instance, to Judge Palmieri in a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. Judge Palmieri is in the best position to determine what weight, if any, was accorded this conviction, and therefore should be given the opportunity to pass on the question and to create a record suitable for review by this Court.

The record strongly suggests that Judge Palmieri accorded this conviction little significance. Although he adverted to it during the sentencing proceeding, it was scarcely the focus of his concern. Judge Palmieri's comments form a marked contrast to those of the trial judge in *United States v. Malcolm*, *supra*, as to whom this Court concluded that "the garbled criminal record was the dominant factor influencing sentence." 432 F.2d at 816. Furthermore, there is no indication that Judge Palmieri was misled regarding the facts underlying Cumberbatch's state conviction. Defense counsel set forth for Judge Palmieri the underlying facts (Tr. 631-32), and his account closely parallels the summary of the evidence in

the opinion of the Appellate Division. To the extent that Judge Palmieri relied at all on the state conviction, he relied on a version of facts provided by the defense, which the Appellant Division found insufficient to sustain a conviction. There is no evidence that Judge Palmieri relied on a version of the facts different from that proffered by defense counsel, or that he misconceived Cumberbatch's role. There is thus little likelihood that Cumberbatch was prejudiced by his deliberations.*

Finally, Cumberbatch not only seeks a remand for resentencing, but also asks that this case be assigned to another judge. He makes no effort to take account of this Court's *en banc* opinion in *United States v. Robin*, Dkt. No. 76-1033, slip op. 2591 (2d Cir., March 30, 1977), which defines the circumstances under which reassignment to another judge is proper. When the criteria set forth in *Robin*, slip op. at 2593, are considered, the impropriety of reassigning this case is apparent. First, reassignment would require substantial effort from the newly drawn judge, who would be required to familiarize himself with the entire trial record. This Court observed in *Robin* that "[a] judge who has presided over a lengthy trial often gains an intimate insight into the circumstances of the defendant's crime, which may prove uniquely useful in determining the sentence to be imposed, whereas no such reason would nor-

* Cumberbatch also suggests that the existence of this conviction improperly prevented him from taking the witness stand in his own defense. There are several ready answers to this argument. First, use of his conviction for impeachment at the time of the trial was eminently proper; Rule 609(e) of the Federal Rules of Evidence specifically permits the use for impeachment of convictions on appeal. Second, one of his two felony convictions still stands, and thus even if he were to testify at a new trial he would be vulnerable to impeachment. Third, given the evidence adduced, it is hard to imagine how Cumberbatch could have helped himself by testifying.

mally exist after a guilty plea." Slip op. at 2596. Second, it is most unlikely that Judge Palmieri would have difficulty in putting the state conviction from his mind. He gave it minimal attention in his remarks upon sentencing, and it is inconceivable that it created an indelible impression that could not be eradicated. Furthermore, Judge Palmieri would be entitled to consider the facts underlying the vacated conviction, see *United States v. Malcolm supra*, 432 F.2d at 316, and so relatively little would be removed from his consideration on remand. Third, *Robin* requires consideration of whether the appearance of justice would be furthered by reassignment. We submit that a reassignment here would amount to this Court's imprimatur upon the disingenuous and utterly unwarranted criticism of Judge Palmieri's conduct that appears in Cumberbatch's brief. Even an implicit recognition of those criticisms would be a grotesque injustice.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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APPENDIX

Administrative Code of the City of New York:

§ 436-6.6 Permits for possession and purchase of rifles and shotguns.—It shall be unlawful to dispose of any rifle or shotgun to any person unless said person is the holder of a permit for possession and purchase of rifles and shotguns; it shall be unlawful for any person to have in his possession any rifle or shotgun unless said person is the holder of a permit for the possession and purchase of rifles and shotguns.

* * * * *

§ 436-6.9 Certificates of registration.—a. It shall be unlawful for any person to have in his possession any rifle or shotgun unless said person is the holder of a certificate of registration of such rifle or shotgun. It shall be unlawful for any person, not a licensed dealer, to dispose of any rifle or shotgun for which he does not have a certificate of registration.

b. Any person in possession of rifles or shotguns upon the effective date of this law shall within six months thereof file with the control board a declaration in duplicate, signed and verified by the declarant which shall list by caliber, make, model, manufacturer's name and serial number, or if none, any other distinguishing number or identification mark of each rifle and shotgun possessed by the declarant, and he shall at the same time make application for a certificate of registration for each of said rifles and shotguns, and an application for a rifle and shotgun permit, provided, however, that no such person shall be in violation thereof because of the failure of the control board to inform him of the determination on his application.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Jeremy G Epstein being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

two That on the *27th* day of *May*, 1977
he served ^{yes} a copy of the within ^{brief}
by placing the same in a properly postpaid franked
envelope addressed:

Robert H. Blum, Esq.
351 Broadway
New York, New York 10013

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing *in* the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Sworn to before me this

27th day of *May* 1977

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 00-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979